IN THE

Supreme Court of the United States

No. 70-5138

MITCHELL EPPS, PAUL and ELLEN PARHAM, and ROSA BELL ANDREWS WASHINGTON, on behalf of themselves and all others similarly situated,

Appellants,

v.

AMERICO V. CORTESE, ESQUIRE, individually and as Prothonotary of the Court of Common Pleas of Philadelphia County, 288 City Hall, Philadelphia, Pennsylvania; and

WILLIAM M. LENNOX, individually and as Sheriff of Philadelphia County, Third Floor, City Hall, Philadelphia Pennsylvania;

LEWIS WASHINGTON, 4228 West Girard Avenue, Philadelphia, Pennsylvania;

GOVERNMENT EMPLOYEES EXHCANGE CORPORATION, Kaign Avenue and Crescent Boulevard, Pennsauken, New Jersey; and

SEARS, ROEBUCK AND COMPANY, Adams and Whitaker Avenue, Philadelphia, Pennsylvania; on behalf of themselves and all others similarly situated,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLANTS

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OPINION BELOW

The Opinion and Order of the District Court, App. at 88-105 are reported at 326 F.Supp. 127 (E.D. Pa. 1971).

JURISDICTION

This suit is a civil rights action instituted under 28 U.S.C. §§1343(3) and (4), 2201, 2202, 2281, and 2284, and 42

U.S.C. § 1983. The Opinion and Order of the District Court were filed on March 31, 1971. Plaintiffs' Notice of Appeal was filed on April 8, 1971, and they submitted their Jurisdictional Statement in this Court on April 26, 1971. Probable jurisdiction was noted on May 24, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

QUESTIONS PRESENTED

(1) Whether a statutory scheme of statewide application which authorizes the seizure of personal property of individuals by state officers without providing any notice or opportunity to be heard to these individuals prior to seizure and without requiring that the claimants to this property allege the validity of their claims prior to seizure is on its face a violation of these individuals' right to due process of law secured by the fourteenth amendment.

(2) Whether a statutory scheme of statewide application which authorizes state officials to enter the homes of individuals and seize their personal property, forcibly if necessary, upon the claimants' mere filing of a bond and a writ directing such officials to seize this property is on its face a violation of these individuals' right to be free from unreasonable searches and seizures secured by the fourth and fourteenth amendments.

STATUTES INVOLVED

The Pennsylvania statutes and rules challenged are the Act of 1705, 1 Sm.L. 44, § 12, 12 P.S. § 1821, and the Act of April 19, 1901, P.L. 88, as amended, 12 P.S. §§ 1824-44. These statutes have been suspended insofar as they relate to procedure, except where deemed not suspended under Pa. R.C.P. 1406, by the Pennsylvania Rules of Civil Procedure. The rules challenged are Pa. R.C.P. 1071-87. These statutes and rules are set out in full in Appendix "A."

STATEMENT

On September 18, 1970, this action was commenced by Mitchell Epps, Paul and Ellen Parham, and Rosa Bell Andrews Washington, all individuals residing in Pennsylvania, on behalf of themselves and all other individual residents of Pennsylvania who are or may in the future be subject to the Pennsylvania replevin-with-bond procedure in Philadelphia County.[1] The relief sought by the plaintiffs was (1) a declaration that the statutes and rules establishing replevin are unconstitutional; (2) an injunction restraining the defendants from filing actions to obtain, issuing, and executing upon writs of replevin; and (3) an order that the property replevied from the named plaintiffs be returned. Named as defendants were the prothonotary and sheriff of Philadelphia County, who issue and execute upon, respectively, these writs, and the entities which had requested and obtained the writs of replevin against the named plaintiffs. These entities, Government Employees Exchange Corporation; Sears, Roebuck and Company; and Lewis Washington, respectively, were sued on their own behalf and on behalf of all other entities who have instituted or may in the future institute replevin actions in Philadelphia County.

The matter was presented to the court below entirely upon stipulations relating to the facts in the named plaintiffs' cases and the workings of the replevin procedure in Pennsylvania.

Plaintiff Mitchell Epps had, since 1968, two types of accounts with defendant Government Employees Exchange (hereinafter "GEX"): (1) a revolving charge account, on which he purchased chiefly wearing apparel; (2) time pay-

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[1] Hereinafter, this procedure shall be designated as "replevin." However, plaintiffs did not challenge the Pennsylvania procedure of replevin without bond, also provided for in the statutes and rules challenged, which permits recovery of personal property in specie after the claimant obtains a judgment.

ment accounts, on which he purchased various personal and household goods. See Appendix "B:" Account Status.[2]

In all of the time payment purchases, Epps had signed documents entitled RETAIL INSTALLMENT CONTRACT–SECURITY AGREEMENT. App. at 35. In this contract, Epps agreed that GEX retained "title" to the merchandise and that GEX could "retake" the merchandise upon default. *Id.* There is no record of his having signed any contract relating to the revolving charge account.

Although Epps had regularly made substantial payments on both accounts, he was in arrears on the revolving charge account in September, 1970. See App. "B." However, recent payments on the time payment accounts had eliminated any arrearages on these accounts. *Id.*[3]

On September 11, 1970, Epps was served with a writ of replevin which directed the Sheriff of Philadelphia County to replevy the goods which he had purchased on the time payment accounts. App. at 15-16. He was not provided with any notice of GEX's action prior to the execution of the writ. No complaint was filed then or at any later time by GEX, and their right to these goods has never been established. The procedure followed by GEX, as will be pointed out below, was completely in accordance with the Pennsylvania replevin procedure.

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[2]This document was excluded from the official Appendix because it had never been marked as an Exhibit below. It was, however, presented to the court and all counsel at oral argument on January 13, 1971, by GEX's counsel and discussed by him and plaintiffs' counsel at some length. Plaintiffs did not discover that this document had not been marked as an Exhibit until they ordered transmission of the record. The Account Status was prepared by GEX and is accepted by plaintiffs because it presents the only clear record of Epps' status with GEX.

[3]The amount of $35.75 indicated as "due" was Epps' regular August monthly payment, the due date for which had not passed on on August 9, 1970.

On February 1, 1969, plaintiff Paul Parham purchased a table, four stools, and a bed from defendant Sears, Roebuck and Company at a cost of approximately $400. App. at 71. At the time of purchase, Parham signed a contract entitled SECURITY AGREEMENT, by which he agreed that Sears would retain "title" to the merchandise and that upon any default Sears could "repossess" the merchandise. *Id.* at 72.

Having lost his job, Parham fell behind in his payments in early 1970. He did attempt periodically to remit a portion of his meagre income to Sears, and in fact paid $25.00 in August, 1970, and $20.00 in September, 1970, on his account, bringing the balance down to $154.47. *Id.* at 73.

Despite that his September payment was accepted by Sears, on September 15, 1970, two deputy sheriffs appeared at his home with a writ of replevin directing them to seize the table, stools, and bed. *Id.* at 17-18. Plaintiff Ellen Parham admitted the deputies only after they exhibited the writ to her and informed her that they were empowered to seize the goods. *Id.* at 68. No notice of this action was provided to the Parhams before the seizure. The only prior communications from Sears were notices dunning the Parhams for payment. No complaint was filed by Sears at this time or at any later time, and Sears' right to seize and retain the goods has never been adjudicated. Forced onto welfare because of Mr. Parham's unemployment, the Parhams have been unable to replace the necessary household goods seized. The procedure followed by Sears was, again, entirely proper under Pennsylvania replevin statutes and rules.

Plaintiff Rosa Bell Andrews Washington was divorced from defendant Lewis Washington in early September, 1970.[4]

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[4] Since defendant Washington appeared pro se no stipulation was effected regarding the Washington fact situation. In the opinion below, the court states at n. 2 (App. at 89) that "There has been no stipulation as to defendant Washington. However his uncontradicted testimony establishes that the property replevied, . . . was owned by him and used by his son, of whom he had custody following divorce proceedings and separation from his wife (See transcript of proceedings on September 25, 1970). He recovered only that which was his

There was a contest over custody of their eleven-year-old son, the parties having reached a consensus that their four-year-old daughter would remain with her mother.

Before any custody order was entered, Mr. Washington seized the boy and, being a deputy sheriff familiar with court papers, filed a praecipe for a writ of replevin against his former wife and her sister, with whom she resided, to seize a bed, two dressers, a cabinet, several of the boy's toys, and his clothes. On September 14, 1970, Mr. Washington himself and two other deputy sheriffs issued the writ and seized the property. Not content with seizing only items used by his son, Mr. Washington also seized a cabinet and a dresser which admittedly had been used by the daughter in the Washington's household prior to the dissolution of their marriage. App. at 29. No notice was provided to Mrs. Washington prior to this seizure. As a welfare recipient, Mrs. Washington has been able to replace the dresser and cabinet seized from her. Mr. Washington has never filed a complaint to establish his right to the goods seized and no adjudication has ever been made confirming his right to them.

A description of the operation of replevin in Pennsylvania is provided in stipulations by the parties and findings of the court below. To commence a replevin action in Pennsylvania, the following and the following only need be filed: (1) An entry of appearance; (2) A praecipe (direction) to the prothonotary requesting him to issue such a writ; (3) An affidavit of the value of the property to be replevied; and (4) A bond in double the value amount cited in the affidavit. App. at 90; Pa. R.C.P. 1073(b) (Appendix "A" at 8-9).

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for use by his son living with him." The court below erred in two respects here. First, there was no decree of custody at the time of the replevin or even at the hearing date of September 25, 1970. Secondly, defendant Washington himself testified that part of the property seized had been used by the daughter in the Washington household prior to its dissolution. See Text and citation *infra*.

Upon receipt of the foregoing, the prothonotary forthwith issues a writ of replevin to the sheriff, directing him to seize the property cited in the praecipe. The prothonotary is not authorized to examine the merit of the writ plaintiff's claim and in fact only assures himself that the proper papers have been filed. App. at 90. He provides no notice to the writ defendant. *Id.* The sheriff, upon receiving the writ, merely executes upon it. He too may not examine the merit of the writ plaintiff's claim and does not do so. *Id.*

After seizure the sheriff must retain custody of the property for seventy-two hours. App. at 91; Pa. R.C.P. 1077. (App. "A" at 10-11). If no counterbond, in double the value of the property alleged in the writ plaintiff's affidavit, is filed by the writ defendant within the seventy-two hour period, the property seized is turned over to the writ plaintiff. App. at 91; Pa. R.C.P. 1076. (App. "A" at 10). As in the instances of the three named plaintiffs here, the replevin action generally ends at this point. The writ defendant almost never files a counterbond and the writ plaintiff merely retains or disposes of the property seized without ever establishing his right thereto. *See* pp. 18-19 *infra.*

Although the rules are silent on the duty of the sheriff to use force if he is repelled in executing this writ, Pennsylvania case law and practice clearly establishes this duty. *See* pp. 38-39 *infra.*

Further, the rules fail to provide (1) that a complaint or any other averment of facts by the writ plaintiff need be filed either at the commencement of or at any later time in the proceeding. App. at 96. In none of the foregoing instances was a complaint ever filed; (2) that any notice be given to the writ defendant concerning his right to recovery of the property by posting a counterbond. In fact, the form required by the rules gives no such notice. App. at 91; Pa. R.C.P. 1354.

The plaintiffs' motion for a temporary restraining order was denied by the judge originally assigned to the case as to the class an all named parties except plaintiff Washington. After an ex parte hearing of defendant Washington, this order was vacated.

A three-judge court was convened pursuant to the plaintiff's motion, and the plaintiffs also moved for a preliminary injunction and summary judgment. The prothonotary and sheriff moved to dismiss; GEX and Sears answered, Sears also moving for summary judgment; and Mr. Washington filed no pleadings. After hearings on October 22, 1970, and January 13, 1971, the latter at which the aforementioned stipulations were presented, the court filed an Opinion and Order granting summary judgment to the defendants on March 31, 1971.

On April 8, 1971, plaintiffs Parham and Washington filed a Notice of Appeal to this court with the lower court. On April 26, 1971, these parties submitted their Jurisdictional Statement in this Court along with motions to proceed *in forma pauperis* and to consolidate this matter with *Fuentes v. Shevin*, October Term 1970, No. 6060. The Court noted probable jurisdiction on May 24, 1971; granted the plaintiffs' *in forma pauperis* motion; and set down this case for oral argument immediately following *Fuentes*.

SUMMARY OF ARGUMENT

Due process of law requires that one be provided with adequate notice and a meaningful opportunity to be heard before he may be deprived of property by the state. *Boddie v. Connecticut*, _____ U.S. _____, 28 L.E.2d 113 (1971); and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949). In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), this Court held pre-judgment wage garnishment unconstitutional on due process grounds, since this procedure provided no notice nor opportunity to be heard to a defendant prior to the time at which he was deprived of his property. The Pennsylvania replevin procedure

analogously violates due process because it permits a pre-judgment seizure of one's personal property. The Pennsylvania procedure, moreover, is especially constitutionally deficient because it requires neither that the writ plaintiff commence an action to finally determine his right to the property seized or even allege a claim of right to the said property.

The court below erred in concluding that *Sniadach* is not controlling because that case is limited to deprivations of wages or media of exchange, such as welfare benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970). There is no authority for delimiting the scope of a precept of procedural due process on the basis of the nature of the property taken without due process. *See Bell v. Burson*, _____ U.S. _____, 29 L.E.2d 90 (1971). Furthermore, if the nature of the property taken is limited to certain "specialized" property, numerous cases have held that pre-judgment seizures of personal property of poor persons is equally as "specialized" as the wages garnished prior to judgment in *Sniadach*. *Hall v. Garson*, 430 F.2d 430, 441 (5th Cir. 1970); *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716, 722 (N.D. N.Y. 1970); and *Blair v. Pitchess*, ___ Cal.3d ___, ___, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 32). The court also erred both in its assertion that the deprivation worked by replevin is temporary since the deprivation generally is permanent, and that a temporary taking was not sufficient to violate due process. *Cf. Griggs v. Allegheny County*, 369 U.S. 84 (1962).

Neither state nor creditor interests exist which give rise to an "extraordinary situation" which would justify retaining replevin irrespective of the hardship worked upon the plaintiffs. The state interest of conserving its financial resources through the avoidance of evidentiary hearings, cited by the court below, is clearly of no consequence. *See Shapiro v. Thompson*, 394 U.S. 618, 633-35 (1969). The creditor interest in obtaining a debtor's property without the inconvenience of an adversary proceeding, when

balanced against the numerous alternative creditor remedies and the great hardship worked upon the plaintiffs by a permanent seizure of their necessary household goods without due process, is insufficient to justify the procedure. *Compare Ownbey v. Morgan*, 256 U.S. 94 (1921).

The signing of a security agreement by the debtor does not work a waiver of the debtor's due process or fourth amendment rights of which he is deprived by replevin. Such a waiver of constitutional rights must be effected voluntarily, knowingly, and intelligently. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The purported waiver here is not an understanding waiver, since the security agreements are worded, at best, ambiguously. *See Swarb v. Lennox*, 314 F.Supp. 1091, *prob. juris, noted*, 39 U.S.L.W. 3424 (U.S. March 29, 1971) (No. 70-6). Since the security agreement is part of a form adhesion contract, there is no voluntary waiver. *Garrity v. New Jersey*, 385 U.S. 493 (1967); and *Santiago v. McElroy*, 319 F.Supp. 284, 294 (E.D. Pa. 1970). Finally, since the waiver is prior to the time when most defenses arise, it is not timely, and hence is neither knowing nor intelligent. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 144-45 (1967); and *Chessman v. Teets*, 354 U.S. 156, 162-63 (1957).

The Pennsylvania statutes are, moreover, not drawn so narrowly as to protect only secured parties or even creditors. This factor is exemplified by the case of plaintiff Washington, whose ex-husband, a deputy sheriff, used replevin to forcibly seize several items from her. The Epps and Parham fact situations point out, respectively, that the Pennsylvania replevin procedures are readily subject to abuse by creditors regarding, respectively, the scope of security agreements and debtor reliance on previous acceptance of payments. The court below erred in focusing on the facts of the Parham case to the exclusion of the facts of the cases of the other named plaintiffs and of the operation of the statutory scheme challenged in general. *See Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423-24 (1915).

The Pennsylvania replevin procedure also violates the plaintiffs' fourth amendment right to be free from unreasonable searches and seizures. The fourth amendment clearly applies to civil proceedings, as it was enacted principally to assure the privacy and sanctity of the home. *Camara v. Municipal Court,* 387 U.S. 523 (1967); *Weeks v. United States,* 232 U.S. 383, 391-92 (1914); and *Laprease v. Raymours Furniture Co.,* 315 F.Supp. 716, 722 (N.D. N.Y. 1970).

Despite lack of express authority for the sheriff to break and enter to execute upon a writ of replevin in the Pennsylvania replevin rules, case law (*e.g., Commonwealth v. Temple,* 38 D. & C. 2d 120 (Centre County O.S. 1965)) and an accompanying affidavit (App. "C") establishes that he is required to forcibly enter if resisted and in fact does do so. Even if the sheriff did not break into their homes, the named plaintiffs have been subjected to forcible seizures because the force of law mandated that they permit the sheriff to enter. *See Bumper v. North Carolina,* 391 U.S. 543, 548-50 (1968). Since the writ plaintiff never need file a complaint or allege a claim of right before any judicial official empowered to examine the merits of his claim, the Pennsylvania replevin search and seizure is without prior determination of probable cause by a magistrate. See *Blair v. Pitchess,* ___ Cal.3d ___, ___, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 26). The search and seizure are therefore not reasonable.

ARGUMENT

I

SINCE THE PENNSYLVANIA REPLEVIN PROCEDURE PERMITS THE SEIZURE OF AN INDIVIDUAL'S PERSONAL PROPERTY BY STATE OFFICERS PRIOR TO THAT INDIVIDUAL'S HAVING BEEN GIVEN NOTICE OF THE SEIZURE AND AN OPPORTUNITY TO PRESENT ANY DEFENSES, IT IS VIOLATIVE OF DUE PROCESS OF LAW ON ITS FACE.

A. Since Replevin Authorizes a Pre-Judgment Seizure of Any of an Individual's Personal Property, It is Violative of Due Process on Its Face.

Due process of law requires that, before one may be deprived of any of his property, he be provided with adequate notice and an opportunity to be heard in defense of his right to his property. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 164-65 (1951) (Frankfurter, J., concurring); and *Roller v. Holly*, 176 U.S. 398, 409 (1900). The notice requirement, as set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1949), demands

> notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

See also Armstrong v. Manzo, 380 U.S. 545, 549-50 (1965). *Armstrong* also establishes, at 552, that the opportunity to be heard must be "at a meaningful time and in a meaningful manner." In *Boddie v. Connecticut*, ____ U.S. ____, 28 L.E.2d 113, 119 (1971), this Court further clarified this point when it stated, regarding due process, that

> its root requirement [is] that an individual be given an opportunity or a hearing *before* he is deprived of any significient property interests, . . .

See also Bell v. Burson, ____ U.S. ____, 29 L.E.2d 90 (1971); and *Goldberg v. Kelly*, 397 U.S. 254 (1970).

The opinion of this Court enunciating these principles which is most closely factually analogous to this case is *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). That case involved a due process challenge of a Wisconsin statute permitting garnishment of the wages of a defendant in a lawsuit at the commencement of the action and prior to the entry of any judgment against him. In finding that a freezing of the defendant's wages by the Wisconsin procedure deprived the wage earner "of his enjoyment of earned wages without any opportunity to be heard and to tender any defense he may have," 395 U.S. at 339, the Court concluded, at 342:

> Where the taking of one's property is so obvious, it needs no extended argument to conclude that absent notice and a prior hearing (cf. *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423) this prejudgment garnishment procedure violates the fundamental principles of due process.

In several respects, the Pennsylvania replevin procedure is more objectionable than the Wisconsin procedure before the Court in *Sniadach* and the procedures challenged in the other cases cited. To obtain garnishment there, the Wisconsin plaintiff was required to commence an action and file, with a court, allegations entitling him to the property of the defendant. Here, the plaintiff need only file his entry of appearance, the bond and accompanying affidavit, and a praecipe with the court clerk (prothonotary). Moreover, the clerk has no discretion in denying the issuance of the writ, as would a judge. Also, the property seized under the Pennsylvania procedure is "frozen" for only three days, and then is turned over to the writ plaintiff. Having obtained the property, the plaintiff almost without exception proceeds no further and retains or disposes of the property as he sees fit without ever establishing his right to it.

In contrast to the procedures challenged in *Mullane* and *Armstrong*, the Pennsylvania replevin procedure provides no

notice whatsoever to the writ defendant prior to depriving the latter of his property. Indeed, the element of surprise is, for the writ plaintiff, the most attractive feature of this procedural device. As in *Bell* and *Goldberg*, this case challenges a procedure which authorizes a seizure of property before the defendant has had any meaningful opportunity to be heard. Unlike the *Bell* procedure, however, he receives no hearing whatsoever prior to seizure and, unlike the procedure challenged in *Goldberg*, he is assured no hearing even after the seizure.

In light of the foregoing, it is hardly surprising that, in *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970), and *Blair v. Pitchess*, ____ Cal. 3d ____, ____ P.2d ____, ____ Cal. Rptr. ____ (Sup. Ct. No. 942-966, opinion filed July, 1, 1971), analogous New York and California procedures were struck down on due process, as well as fourth amendment, grounds. These decisions are of course adverse to the decision in *Fuentes v. Faircloth*, 317 F.Supp. 954 (1970), *prob. juris. noted sub nom.* Fuentes v. Shevin, 39 U.S.L.W. 3359 (U.S. Feb. 22, 1971) (No. 6060). However, the New York procedure invalidated in *Laprease* (N.Y. CIVIL PRAC. LAW. § 710(a) (McKinney 1963)) and the California procedure invalidated in *Blair* (CALIF. CODE OF CIVIL PROC. §§ 509-21 (West 1954)) as well as the Florida provisions challenged in *Fuentes* (FLA. STATS. ANN. §§ 78.01, 78.08 (1971 Supp.)) require that a complaint be filed against the defendant contemporaneously with the writ.[5] The Pennsylvania procedure requires neither that an adjudication of the parties' rights to the property be commenced by the writ plaintiff nor that the writ plaintiff even allege the grounds of his claim.

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[5]Another recent case refusing to overturn replevin statutes, *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d 100 (10th Cir. 1970), can be similarly distinguished. The Oklahoma statutes in question in *Brunswick* require that the plaintiff allege that he is the owner of the property or has a special ownership or interest therein, that he is entitled to immediate possession, 12 OKLA. STATS. ANN. § 1572 (1961), and that a summons giving notice of the commencement of an action must issue. *Id.* at § 1575.

B. The Court Below Erred in Delimiting the Scope of *Sniadach* and *Goldberg* to Prejudgment Seizures of Wages and Welfare Benefits Since the Deprivation of Property Worked by Replevin is Neither Less Serious Nor Less Permanent Than Prejudgment Wage Garnishment.

The court below recognized that "there are broad and general similarities" between *Sniadach* and *Goldberg* and the case before it. App. at 97. However, it relied heavily on Mr. Justice Douglas' statement in *Sniadach*, at 340, that, "We deal here with wages—a specialized type of property presenting distinct problems in our economic system." In finding that wages and welfare benefits are unique and "more than mere property" because they alone cannot be replaced, like other property, App. at 97, the court below read *Sniadach* in a manner which numerous other courts have expressly repudiated.

The due process challenge here, as in *Sniadach*, is procedural in nature. In a procedural question, the significance of such subjective elements as the nature of the property seized without due process is not significant; it is the procedure utilized which is the subject of challenge. *See* Comment, 55 MINN. L.REV. 634, 637-38, 647 (1971).

Such a reading of *Sniadach* explains the result in *Goldberg v. Kelly*, 397 U.S. 254 (1970), where this Court struck down a statutory scheme permitting the suspension of welfare benefits prior to a hearing. This reading is also supported by the result in *Bell v. Burson*, ____ U.S. ____, 29 L.E.2d 90 (1971). In that case, this Court held that state provisions permitting the suspension of the license of an uninsured motorist after an accident prior to a hearing on the motorist's liability violated due process of law. The fact that wages, or welfare benefits, or a driver's license has been seized by the state prior to hearing has hence been held to be of no consequence. The fact that this case concerns a seizure of personal property, as opposed to wages,

prior to hearing should likewise be held constitutionally insignificant.

Cases stating expressly that the nature of property seized is not in any degree determinative include *Lebowitz v. Forbes Leasing & Finance Corp.*, 326 F.Supp 1335, 1341-48 (E.D. Pa. 1971) (seizure of corporate property through foreign attachment) (dictum); *Klim v. Jones*, 315 F.Supp. 109, 122 (N.D. Cal. 1970) (seizure of tenant's personal property by landlord); and *Larson v. Fetherston*, 44 Wis.2d 712, 718, 172 N.W.2d 20, 23 (1969) (pre-judgment garnishment of bank accounts).

Many cases, while refusing to adopt the reasoning of *Lebowitz, Klim,* and *Larson* that the nature of the property seized is of no significance whatsoever, have held that seizures of personal property of poor persons present the same distinct problems in our economic system as pre-judgment garnishments of wages. In *Hall v. Garson*, 430 F.2d 430, 441 (5th Cir. 1970), which concerned a landlord's seizure of a tenant's personalty, the Fifth Circuit Court of Appeals points out that

> the same kind of deep personal hardship can result from the seizure of personal and household goods as resulted from the garnishment of wages under the Wisconsin statute in *Sniadach.*

In *Santiago v. McElroy*, 319 F.Supp. 284, 293 (E.D. Pa. 1970), a three-judge court held seizure of tenants' personal property "indistinguishable" from the seizure of wages in *Sniadach.* Other cases supporting an identical application of *Snaidach* include, *e.g., Osmond v. Spence*, ____ F.Supp. ___, 39 U.S.L.W. 2660 (D. Del. May 13, 1971); *Swarb v. Lennox*, 314 F.Supp. 1091 (1970), *prob. juris. noted*, 39 U.S.L.W. 3424 (U.S. March 29, 1971) (No. 70-6); and *Jones Press, Inc. v. Motor Travel Services, Inc.*, ____ Minn. ____, 176 N.W.2d 87, 90 (1970).

The cases most clearly on point are *Laprease v. Raymours Furniture Co.*, 315 F.Supp. 716 (N.D. N.Y. 1970);[6] and *Blair v. Pitchess*, ____ Cal. 3d ____, ____ P.2d ____, ____ Cal. Rptr. ____ (Sup. Ct. No. 942-966, opinion filed July 1, 1971).

These cases concerned challenges of the New York replevin and California claim and delivery laws, respectively, both of which procedures are analogous to the Pennsylvania provisions challenged here. Both relied upon *Sniadach* in reaching their respective conclusions that the procedures challenged violated procedural due process. The *Laprease* court, addressing itself directly to the issue raised by the court below here, stated at 722:

> Beds, stoves, mattresses, dishes, tables, and other necessaries for ordinary day-to-day living are, like wages in *Sniadach*, a "specialized type of property presenting distinct problems in our economic system," the taking of which on the unilateral command of an adverse party "may impose tremendous hardships" on purchasers of these essentials.

It is urged, therefore, that this Court focus upon the fact that the Pennsylvania replevin procedures permit a seizure

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[6]Most of the law review material commenting upon the result in *Laprease* has applauded its result. *See* Note, 35 ALBANY L. REV. 370 (1971); Comment, 55 MINN. L. REV. 634 (1971); Note, 24 VANDERBILT L. REV. 155 (1970); and Note, 19 U. KAN. L. REV. 281 (1971). *But see* Comment, Laprease *and* Fuentes: *Replevin Reconsidered*, 71 COLUM. L. REV. 886 (1971). The Albany note concludes, for example, that "What is surprising is that such a decision was not made some years ago. . . . But . . . [m]ost actions involving pre-judgment seizures of chattels involved the poor who were not able to muster enough backing to fight such a procedure. It was not until the late 1960's that federal funds became available to the legal aid societies, thus enabling them to expand their mode of operation so as to make themselves more readily available to those who could not afford to contest such an action." 35 ALBANY L. REV. at 377.

The University of Kansas note also considers *Fuentes* at some length and criticizes its result. 19 U. KAN. L. REV. at 293-95.

of property prior to notice and a hearing rather than the nature of the property seized. However, should the Court find that the nature of the property seized is significant, it is alternatively urged that the property seized here is equally as "specialized" as the property seized in *Sniadach* and that *Sniadach* therefore applies to the instant fact situation.

The record of this case presents clear evidence of the tenability of the latter assertion. Appellants Parham and Washington are welfare recipients. Their economic status is hence more precarious than the wage-earner considered in *Sniadach*. Their welfare benefits provide them with the bare minimum for sustenance. There is no opportunity to budget extra funds and save to repurchase the table and bed and clothes cabinets, respectively, that have been seized from them. Therefore, they will be financially incapable of replacing this property. They simply must do without it. Clearly, the seizure of necessary household goods is equally and perhaps more capable of "driving a poor family to the wall" than pre-judgment wage garnishment.

The court below, in harmonizing its analysis of *Sniadach* with *Goldberg* states that "[w]elfare benefits there were the equivalent of the 'wages' earned" because both are "the medium of exchange through which to obtain the day's needs." App. at 98. Admittedly, the seizure here is not a seizure of a medium to obtain daily needs. It is a seizure of property itself serving daily needs that can be acquired through these media. The seizure of such property should certainly rise to the level of the seizure of the medium through which it is acquired.

In addition to focusing upon the nature of the property seized here, the court below also asserts that, since the taking by replevin is a "temporary dispossession" of the property, an opportunity to be heard at a subsequent time is adequate to prevent a deprivation of the plaintiffs' property without due process. App. at 100-01.

Replevin is theoretically a provisional remedy, i.e., a remedy granting temporary relief to a certain party pending

final disposition. However, many provisional remedies have, with increasing frequency, been utilized by creditors to obtain complete relief. A seizure having been made, the creditor has succeeded in his purpose of obtaining the consumer's goods and the action is, in most cases, ended. No ultimate hearing on the merits is pursued. *See* Comment, *Provisional Remedies in New York Reappraised Under Sniadach v. Family Finance Corp: A Constitutional Fly in The Creditor's Ointment*, 34 ALBANY L.REV. 426, 427-29 (1970).

The finality of a provisional remedy is well exemplified by the Pennsylvania replevin procedure. The creditor need file no complaint, and the consumer is never summoned. The consumer's only method of retaining his property is by filing a counterbond in double the value of the property seized. However, this expense burden is so great as to be prohibitive for the typical writ defendant. *See Santiago v. McElroy*, 319 F.Supp. 284, 289 para. 17 (E.D. Pa. 1970). Moreover, the writ form does not apprise him of the right to recover his property by filing a counterbond.

The consumer's only means of forcing the creditor to proceed to finality is the filing of a praecipe under Pa. R.C.P. 1037(a).[7] However, the consumer is never apprised of this requirement and must hire an attorney to be so apprised. It is not surprising then, that most Pennsylvania replevin actions, as in the cases of the named plaintiffs here, end at the provisional seizure of property. Furthermore, during the pendency of the outcome of any subsequent proceeding, the goods are retained by the creditor. The consumer is therefore deprived of his property in any event, at least for a substantial temporary period.

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[7]JUDGMENT UPON DEFAULT OR ADMISSION. ASSESSMENT OF DAMAGES. If an action is not commenced by a complaint, the prothonotary, upon praecipe of the defendant, shall enter a rule upon the plaintiff to file a complaint. If a complaint is not filed within twenty (20) days after service of the rule, the prothonotary, upon praecipe of the defendant, shall enter a judgment of non pros.

The argument of the court below that a temporary dispossession of property does not effect a taking also disregards the teaching of Mr. Justice Harlan's concurring opinion in *Sniadach*, 395 U.S. at 342-44. Even were the deprivation temporary, there is, nevertheless, a deprivation of the use of the property replevied prior to an opportunity for the consumer to be heard. *See Blair v. Pitchess*, ____ Cal. 3d ___, ___, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___, (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 28-29). *See also Griggs v. Allegheny County*, 369 U.S. 84 (1962); and *United States v. Causby*, 328 U.S. 256 (1946) (temporary takings of property by the Government or State without due process of law are unconstitutional).

The seizure here is certainly no less permanent than the *Sniadach* seizure. There, the seizure preceded a lawsuit that would ultimately try the merits of the creditors' claim. Here, the creditor need not commence a lawsuit to determine his ultimate right to the goods—nor even allege a claim of right prior to seizure. Hence, the seizures of the Parhams' table and bed and Mrs. Washington's cabinet and dresser are, for all practical purposes, permanent takings of this property without these parties' having had any day in court whatsoever.

C. The Court Below Erred in Finding That State and Creditor Interests Found Not to be Present in *Sniadach* Render That Case Distinguishable From the Instant Case.

In *Sniadach*, the Court recognized, at 395 U.S. 339, that "summary procedure may well meet the requirements of due process in extraordinary situations." The court below, App. at 101-02, found several state and creditor interests present here which it deemed constituted "extraordinary situations" justifying the perpetuation of replevin.

The principal state interest found by the court below is that "summary seizure conserves State financial resources and administrative time in reducing the number of eviden-

tiary hearings in a given lawsuit." App. at 101. This argument appears based on the erroneous presumption that there will ever be *any* evidentiary hearing in the typical replevin suit. It also presumes that a savings in the state coffers and court time justifies a denial of individuals' due process rights. In *Boddie v. Connecticut*, ____ U.S. ____, 28 L.E. 2d 113, 121 (1971), this Court, in upholding a due process right to first access to state courts for divorce actions, rejected a similar argument despite the fact that this holding promulgated additional litigation in state courts. No such additional litigation is created here, since the hearing would be pursuant to an already-pending state proceeding. This Court has also emphasized that even a substantial saving of state financial resources does not create an "extraordinary situation" justifying a state's denial of fourteenth amendment rights to its citizens. *See, e.g., Shapiro v. Thompson*, 394 U.S. 618, 633-35 (1969).

The Government and state interests present in the cases cited in *Sniadach* and *Boddie* as exemplifying "extraordinary situations" are clearly distinguishable from the state interest found by the court below to be present here. These cases touched upon such matters as the war power, national security, or government regulation of a certain type of business in the public interest.[8] The state interest found by the

[8]The cases cited in *Sniadach* and *Boddie* are *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961) (dismissal of short-order cook working in Naval Gun Factory without hearing); *Ewing v. Mytinger & Castleberry, Inc.*, 339 U.S. 594 (1950) (summary seizure of allegedly mis-branded drugs); *Fahey v. Mallonee*, 332 U.S. 245 (1947) (appointment of conservator to federal savings and loan association); *Bowles v. Willingham*, 321 U.S. 503 (1944) (rent controls established in defense-rental areas during war without landlords' hearing); *Yakus v. United States*, 321 U.S. 414 (1944) (maximum rates for beef sale during war without hearing to sellers); and *Coffin Bros. v. Bennett*, 277 U.S. 29 (1928) (lien on bank stockholders' property prior to hearing).

Also within this line of cases is *Den ex dem. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. 272 (1856). This case is cited by the court below as authority in both its due process (App. at 99, 100) and fourth amendment (*Id.* at 104) arguments. However,

court below here is therefore almost identical to that present in *Sniadach* and *Boddie* and hence is not "extraordinary" within the *Sniadach* meaning of that term.

There is of course a creditor interest served by the Pennsylvania replevin procedure. Not having to allege or prove his case, a creditor can very easily seize his debtor's property. However the interest in providing such a swift and easy remedy to creditors must be balanced against the hardships which such a procedure works upon writ defendants. Only where the creditor's interest clearly outweighs such hardship is an "extraordinary situation" possibly justifying a procedure such as replevin present.

Such an extraordinary situation may arise when there are no practical alternative remedies available to creditors. When the defendant is absent from the jurisdiction and a provisional remedy for the creditor is necessary to assure the defendant's presence in court, an extraordinary situation may well be present. In *Ownbey v. Morgan*, 256 U.S. 94 (1921), for example, an action in which a defendant unsuccessfully challenged a foreign attachment law, such a creditor interest was arguably present. The attachment was necessary to assure that the defendant, a non-resident, would appear in court. *But see Lebowitz v. Forbes Leasing & Finance Corp.*, 326 F.Supp. 1335 (E.D. Pa. 1971); and *Mills v. Bartlett*, 265 A.2d 39 (Del. Super. 1070), *rev'd on other grounds sub nom.* Mills v. Trans Caribbean Airways, Inc., 272 A.2d 702 (Del. 1970). This reasoning also explains the Court's per curiam affirmance in *McKay v. McInnis*, 279 U.S. 820 (1928), an unsuccessful challenge of Maine's pre-judgment attachment law. The lower court opinion, *McInnis v. McKay*, 127 Me. 110, 141 A. 699 (1928), indicates that the defendant appeared specially and

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this case involved a summary procedure whereby the Government was empowered to dispose of the property of an errant treasury official. It held that a party who had purchased the property of a Collector of Customs which had been summarily seized after the Collector's embezzlement could not be ejected from the property.

hence was in all likelihood a non-resident challenging in effect a foreign attachment. *Ownbey* and *McKay* are further distinguishable because attachment is a procedure effected in an action which will ultimately determine the parties' rights to the property attached.

Alternatives not infringing upon their debtors' due process rights are present for creditors. They could commence an action in assumpsit against their debtor for the amount due. This would permit them to acquire a personal judgment which they could use as a basis for execution upon all of their debtor's property. If they desire to recover particular merchandise in specie, they could either repossess the property or commence an action of replevin without bond. Balancing these alternatives against the hardship worked upon the debtor by the immediate, forcible seizure of his necessary personal property effected by replevin clearly shows the lack of an extraordinary creditor interest justifying replevin here. The California Supreme Court, in *Blair v. Pitchess*, ___ Cal.3d ___, ___, ___ P.2d ___, ___, ___Cal. Rptr. ___, ___ (Sup. Ct. No. 942-966, opinion filed July 1, 1971) (slip opinion at 32), concludes that the balance tips thusly:

> However substantially claim and delivery procedure may protect the creditor's interest and indirectly promote the state's interest in business and commerce, it seems to us that such advantages are far outweighed by its detrimental effect upon those whose goods are seized. The removal of personal property, like the garnishment of wages, in many cases imposes tremendous hardship on the defendant and his family and gives the plaintiff unwarranted leverage.

See also Klim v. Jones, 315 F.Supp. 109, 124 (N.D.Cal. 1970).

The court below suggested, App. at 102, an additional creditor-interest argument: that retention of the "adequate and practical remedy" of replevin is to the benefit of debtors, for without it credit would dry up. As discussed above, however, replevin is merely the most oppressive of

a plethora of creditor remedies. There is no evidence that replevin is vital for preservation of credit, and in fact the record would indicate the opposite. Defendant Sears indicated that it suspended the use of this remedy after the commencement of this lawsuit (App. at 60), and failed to present any proof of subsequent profit reduction or disinclination to advance credit as a result of their doing so.

The court below also continually referred to the "title" and security interest retained by a creditor who uses replevin to justify its finding that an extraordinary situation existed here. App. at 101, 105. Initially, it should be pointed out that the Pennsylvania replevin rules make no reference to a prerequisite that title or a security interest be held by the writ plaintiff. See pp. 29-34 *infra*. However, assuming *arguendo* the significance of title or a security interest, any meaning that can be attached to these terms must be gleaned from the Uniform Commercial Code, which Pennsylvania has adopted.

As 12A P.S. §2-401 and the accompanying notes make clear, the concept of "title" is of little or no significance. Section 2-401(1), in fact, states:

> Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest . . .

Therefore, our consideration of the significance of these terms must be directed solely to Article 9 of the Code, which deals with security interests.

Article 9 of the Code provides that the secured party may proceed "by any available judicial procedure." 12A P.S. §9-501(1). More specifically, it permits the secured party to take possession either by "action" or "without judicial process if this can be done without breach of the peace," i.e., by repossession. 12A P.S. §9-503(1). The following subsection, 12A P.S. §9-503(2), moreover, states:

> If a secured party elects to proceed by process of law he may proceed by writ of replevin or otherwise.

Several comments upon this language of §9-503(2) are appropriate. First is the rather obvious point that, when the Code conflicts with the constitutional requirement of due process of law, the Code must yield. Secondly, the Code provides alternative remedies for the secured party besides replevin-with-bond, underscoring the alternatives available to the creditors. Thirdly, the Code's reference to replevin is ambiguous. It may be referring only to replevin-without-bond, a conclusion that would appear consistent with the alternatives of either repossessing or proceeding by "action" recited in §9-503(1). "Action" is defined in 12A P.S. §1-201(1) as

> a judicial proceeding [which] includes recoupment, counterclaim, set-off, suit in equity and any other proceedings in which rights are determined.

Since the writ plaintiff need not even allege a claim of right under Pennsylvania replevin procedure and no final adjudication upon his rights is forthcoming, it might be argued that replevin-with-bond is not an "action" within the Code's definition of that term.

Therefore, the references of the court below to the "title" or security interest of the replevin writ plaintiff are merely the employment of empty phrasology to bolster its opinion. The retention of "title" or a security interest does not advance the argument that an "extraordinary situation" is present which justifies the continued existence of replevin. Neither is the state interest found by the court sufficient to manifest an "extraordinary situation." On the other hand, the writ defendant frequently suffers an immediate and permanent deprivation of necessary household goods before there is ever a court determination that he is not entitled to retain these goods. This balance clearly favors the consumer and works against a retention of replevin.

D. The Signing of an Installment Contract Granting to a Creditor a Security Interest or Some Other Interest in Goods Purchased Under the Contract Does Not Effect a Waiver of Due Process or Fourth Amendment Rights by a Consumer–Debtor.

Plaintiffs Epps and Parham, as noted in the previous section, signed contracts granting to their creditors "title" and a security interest in the goods purchased. Although the court below did not address the issue of potential waiver of due process rights worked by these contracts, it did suggest that waiver of fourth amendment rights was an issue. App. at 104. Moreover, the waiver argument was persuasive to the *Fuentes* court. Since the court below found no violation of due process or fourth amendment rights, it was never necessary for it to confront the issue of waiver. However, this is an issue which must be successfully confronted by the plaintiffs if they are to ultimately prevail.

The issue of waiver is of great importance in consumer law because, due to the unequal bargaining power of seller-creditor and consumer-debtor, the former will frequently be able to extract very comprehensive waivers from the latter as a matter of course. One court has even suggested that pre-judgment wage garnishment may be effectuated and *Sniadach* entirely overcome by express contract provision. *See Young v. Ridley*, 309 F. Supp. 1308, 1312 (D. D.C. 1970). Hence, this Court must place a heavy burden on the seller-creditor alleging a waiver of due process or any other rights in a consumer-credit transaction.

Such an approach is consistent with the long-standing rule of this Court that there is a presumption against the waiver of constitutional rights. A waiver, to be effective, must be made knowingly, intelligently, and voluntarily. *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); and *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

The security agreements of plaintiffs Epps and Parham, it is submitted, are typical of those signed by most consumer-debtors. Both provide that the secured party shall

retain "title," which, as discussed *supra*, is merely another way of stating that the creditor retains a security interest in the merchandise purchased. Epps' contract authorizes GEX to "retake" the merchandise; the Parhams contract authorizes Sears to repossess the goods. Neither contract mentions the term "replevin" and neither describes a procedure akin to replevin, i.e., permitting forcible seizure of the goods without notice. A reasonable interpretation of the Parham-Sears contract is that, from the express authorization to repossess, an absence of authority to replevy makes such a right contrary to the terms of the contract. The authority to "retake" cited in the Epps-GEX contract is ambiguous. Since GEX is the party which has drawn up the contract, however, such an ambiguity should be interpreted in favor of Epps and, like the Parham-Sears contract, to authorize repossession only.

It is extremely unlikely that the Parhams and Epps understood that they were waiving the due process rights which replevin violates when they signed their respective purchase contracts. The failure of a contract signatory to understand a waiver of due process rights has been held sufficient to overcome a claim of waiver of due process in two confession of judgment cases, *Osmond v. Spence*, ___ F. Supp. ___, 39 U.S.L.W. 2660 (D. Del. May 13, 1971); and *Swarb v. Lennox*, 314 F. Supp. 1091 (1970), *prob. juris. noted*, 39 U.S.L.W. 3424 (U.S. March 19, 1971) (No. 70-6). Moreover, the confession clauses considered in those cases, while termed in legal jargon, expressly granted power to confess to the creditor. The contracts here, far from granting the creditor a right to replevy, could be interpreted as denying the creditor this right.

There are two other reasons why the purported waivers here are ineffectual. First, such "waivers" constitute an adhesion contract and hence are not voluntary. The Court, in such cases as *Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968); *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967); and *Miranda v. Arizona*, 384 U.S. 436, 476 (1966),

has emphasized the significance of the element of voluntariness in considering waivers of constitutional rights.

The significance of voluntariness in this context is emphasized by the holdings in *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970) (three-judge court); and *Blair v. Pitchess*, ___ Cal.3d ___, ___ P.2d ___, ___ Cal. Rptr. ___ (Sup. Ct. No. 942-966, opinion filed, July 1, 1971). *Santiago* declared rent distraint unconstitutional in Pennsylvania. The defendants in that case contended that clauses in form leases entitling the landlord to use distraint and waiving all other statutory protections afforded to tenants worked a waiver of the tenants' due process rights. The court rejected this contention, finding that the form leases were "put before tenants on an 'except this or get nothing' basis." In *Blair*, the court observed that most retained title and collateral security agreements were adhesion contracts that could not work a waiver of constitutional rights. ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 24-25). Likewise, the plaintiffs here had no choice but to sign a contract containing a security agreement or to do without needed consumer goods. *See also* Shuchman, *Consumer Credit by Adhesion Contract*, 35 TEMP. L.Q. 125 (1962)

Any purported waiver is also ineffectual because it was not timely and hence not knowing and intelligent. The waiver was allegedly effected at the time that the contract was signed. This point in time is long prior to that when most defenses of the consumer arise, such as breaches of warranties and disputes in payments. At the time that he purchased his time payment account goods, Mitchell Epps could have hardly perceived that they could be forcibly seized for delinquencies on other accounts. He could hardly be said to have waived the right to raise this defense when he signed his time payment contracts, because the possibility of these consequences probably never entered his mind at that time. Likewise, the Parhams can hardly be said to have waived, at the time that they signed their contract,

their right to show the court that they were making payments on their account and should not have been subject to forcible seizure of the goods purchased. *See, e.g., Curtis Publishing Co. v. Butts,* 388 U.S. 130, 144-45 (1967) (failure to raise defense unknown to defendant does not waive unknown defense); *Chessman v. Teets,* 354 U.S. 156, 162-63 (1957) (waiver at early stage in proceeding does not carry over to latter stage in proceeding); and *United Firemen's Insurance Co. v. Thomas,* 82 F. 406, 409 (7th Cir. 1897) (alleged waiver at time of signing contract not operative where not made with knowledge or intent to waive rights).

The same considerations can be raised regarding any potential waiver of fourth amendment rights. However, one point makes the contention that fourth amendment rights have been waived even more tenuous. Any purported consent to search the writ defendant's home and seize merchandise purchased on credit is given only to the seller-creditor. There is no authorization granted to government officials to forcibly enter the writ defendants' home to search it and seize this merchandise. See *Blair,* ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 24). Therefore, there is neither a waiver of due process nor fourth amendment rights worked by the consumer-debtor's signing of a security agreement.

E. Since the Pennsylvania Replevin Statutes Are Not Narrowly Drawn To Meet Extraordinary Situations, They Are Violative of Due Process on their Face.

After its *Sniadach* declaration that provisional remedies may meet due process in certain extraordinary situations, this Court states, at 395 U.S. 339:

> But in the present case no situation requiring special protection to a state or creditor interest is presented by the facts; nor is the Wisconsin statute narrowly drawn to meet any such unusual condition.

The requirement that a statute potentially working a deprivation of due process be narrowly drawn is also considered in *Osmond v. Spence*, ___ F. Supp. ___, 39 U.S.L.W. 2660 (D. Del. May 13, 1971) (slip opinion at 18); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 723 (N.D.-N.Y. 1970); and *Blair v. Pitchess*, ___ Cal.3d ___, ___, ___ P.2d ___, ___, ___ Cal. Rptr. ___, ___ (Sup. Ct. No. 942-966, opinion filed, July 1, 1971) (slip opinion at 28).

The court below here erred in two respects in this regard. First, it failed to consider the entire record before it in almost its entire discussion. Almost every statement that the court makes relates to the Parham fact situation, ignoring the Epps and particularly the Washington fact situations. Secondly, rather than considering whether the statute is narrowly drawn, it confines itself to discussing the operation of the statute as if it were narrowly drawn, referring to abusive uses, such as the Washington fact situation, as "hypothetical circumstances of undue hardship not presently before the Court." App. at 102.

The Washington fact situation reveals replevin in a context completely removed from that of creditor and debtor. The seizure here is effected only because the writ plaintiff, himself a deputy sheriff, happened to know about replevin. Defendant Washington, after summarily seizing custody of his son, has proceeded to summarily seize personal property in the possession of his former wife belonging not only to his son but to his daughter also.

Any discussion of creditor interests and the enforcement of a security interest of a creditor in this context is clearly inappropriate. As there is no creditor, there is no creditor interest at all. The interest of the state in furthering such an unchecked and arbitrary seizure is also difficult to conjecture.

The Epps fact situation is also glossed over by the court. Nothing in the Epps time payment contracts would appear to create a security interest in the items purchased through these contracts for purchases on Epps' separate revolving

charge account. We do not have the revolving charge contract (if indeed there was any such contract), but even if a security interest were taken in time-payment purchases in that contract, such a security interest was unconscionable and hence unenforcible. *See Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

In its discussion of *Laprease, Fuentes,* and *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d 100 (10th Cir. 1970), the replevin challenges which pre-dated it, the court below relies heavily on the fact that "default is not denied" here. App. at 103. In fact, however, there is no default in the Washington fact situation and the writ plaintiff's claim of right is denied, even partially, by the writ plaintiff himself. App. at 29. A close examination of the Epps fact situation, moreover, reveals that here there was no default on the contract pursuant to which the goods replevied could have been properly seized. Even the Parham case hardly evinces a clear showing of default, for the Parhams had made recent payments, one of which was accepted by Sears only days before the replevin. The silent acceptance of this payment and the payment in the previous month established Sears' acceptance of a payment schedule. App. at 73.[9]

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[9]Most of the replevin cases have commented at length upon whether the particular named parties were "in default" to their creditors when their property was replevied. The court below, emphasizing the significance of "default," states: "Thus, the instant case, where default is not denied, is closer to *Brunswick* and on the theory advanced by the *Laprease* court, we might well follow *Brunswick*." App. at 103. It is submitted that in fact whether the named parties were "in default" is hardly a proper ground for distinguishing these cases and has not in fact actually been a ground for decision. The *Brunswick* court was presented with the case of a corporate conditional vendee which claimed that its vendor had converted goods seized under the doctrine of *custodia legis*. The court, dismissing what appears to have been a make-weight constitutional argument in one paragraph, closes its opinion with emphasis on the vendee's admission of default.

In *Laprease*, the court had before it a named plaintiff, Beverly Laprease, whom it described as "on welfare and unable to make the required payments." 315 F. Supp. at 719. However, despite this apparent finding of a default by Mrs. Laprease, the court distin-

The Uniform Commercial Code authorizes the creditor to utilize provisional remedies only when the debtor is in "default." 12A P.S. §§9-501(1), 9-503(1). But default is a legal term, and there cannot legally be a default until one is admitted or there is determined to be one by a neutral arbitor. By permitting the creditor to proceed to seize whenever *he* deems that there is a default renders Pennsylvania replevin's constitutionality inadequate.

As the Epps facts exemplify, the creditor's "discretion" controls not only the default, but the scope of the security interest. As the Washington facts exemplify, the writ plaintiff need not have a security interest nor be a creditor to invoke replevin. The simple fact is that all a Pennsylvania resident need do is file a entry of appearance, praecipe, and affidavit of value and post a bond to seize, without notice, anything from anyone for any reason—or for no reason at all. The writ plaintiff may of course be liable on the bond if he is pursued by the writ defendant, but if his victim is someone as poor and powerless as the Parhams and Mrs. Washington, there is little prospect for such retribution. Moreover, the writ defendant, if he cannot post a counter-bond, is doomed to deprivation of his property for an indeterminate length of time even if he can afford a lawyer to file a counter-replevin or a praecipe under Pa. R.C.P.

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guished *Brunswick* because a default has been admitted in the latter case.

In *Fuentes*, the plaintiff had a clear breach of warranty defense, which would appear to obviate any finding that she was "in default." However, the court there held that any failure to make a payment—even when the consumer had a breach of warranty defense—constituted a "default."

Clearly, whether the named plaintiff is "in default" has not been a controlling circumstance in these cases. The most recent decision, *Blair v. Pitchess*, properly did not consider whether the named party was in default in rendering its holding of unconstitutionality. Moreover, *Blair* was a taxpayer's action and did not even include parties to California claim and delivery actions as parties in the lawsuit.

Hence, it is submitted that the court below, in addition to erring by disregarding the Parham and Washington fact situations, has erroneously attached significance to defaults by the named plaintiffs.

1037(a). And if the status quo is not altered through the writ defendant's initiative, he will never have a day in court. Practically, of course, replevin has been and will be chiefly a tool in the hand of the creditor to seize his debtor's property before he is adjudged entitled to it. The poor consumer will be likely to accede passively to the replevin seizure as a manifestation of power from a system against which he can hardly hope to prevail.

The plaintiffs are individuals who have been subjected to substantial abuse from the Pennsylvania replevin procedure. That this procedure is oppressive is thus exemplified by them without resort to hypotheticals not before the Court. Moreover, the plaintiffs have attacked the Pennsylvania replevin provisions as being violative of due process on their face. The cases of *Wuchter v. Pizzutti*, 276 U.S. 13, 24-25 (1928); and *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 423-24 (1915), establish that the fact situation of individual plaintiffs before the Court is of less consequence than the statutory provision challenged in such an attack.

Wuchter concerned a challenge of a state statute providing that service on defendant non-resident motorists could be had by service upon the Secretary of State. The *Wuchter* defendant *did* receive notice of an action brought against him from the Secretary of State, but was held by this Court to be a proper party in a successful challenge of the statute because the statute failed to mandate that such notice be given. *Coe* concerned a state statute that permitted a levy against the property of a corporate shareholder without notice after an unsuccessful levy against the corporation. This Court reversed a decision that dismissed the defendant's due process claims because he had actually received notice of the proceeding before the levy and failed to act because he had no defense. It stated, at 237 U.S. 424:

> To one who protests against the taking of his property without due process of law, it is no answer to say that in this particular case due process of law would have led to the same result because he had no adequate defense upon the merits.

The result is supported by the result in *Blair v. Pitchess*, where the plaintiffs, qua taxpayers, were permitted to challenge the California claim and delivery law because its enforcement constituted an illegal expenditure of funds. ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 11-13). No showing of actual abuse was deemed necessary in this successfully-instituted purely facial constitutional attack.

Therefore, assuming *arguendo* that the plaintiffs have not brought individual cases showing sufficient undue hardship before the court below, under the teaching of *Wuchter* and *Coe* the court erred in failing to consider abuses to which the Pennsylvania replevin laws, because they are not narrowly drawn, may subject writ defendants.

II. SINCE THE PENNSYLVANIA REPLEVIN PROCEDURE MANDATES THAT STATE OFFICERS ENTER THE HOME OF AN INDIVIDUAL AND SEIZE THAT INDIVIDUAL'S PROPERTY PRIOR TO ANY JUDICIAL DETERMINATION THAT THE SEARCH AND SEIZURE IS REASONABLE, THIS PROCEDURE IS VIOLATIVE OF THE FOURTH AND FOURTEENTH AMENDMENTS ON ITS FACE.

A. The Scope of the Fourth Amendment Is Not Limited To Criminal and Quasi-Criminal Proceedings.

The fourth amendment's prohibition against unreasonable searches and seizures is most commonly invoked by criminal defendants seeking to suppress evidence obtained against them by the police in illegal searches. However, there was clearly no intent on the part of the draftsmen of the Constitution to limit its application to such cases. In *Boyd v. United States*, 116 U.S. 616 (1886), the Court analyzed the nature of the amendment and concluded that, historically, its intent was to protect American citizens from all invasions of their privacy by public officials. 116 U.S. at 630.

The reasoning of the *Boyd* court was reiterated in *Weeks v. United States*, 232 U.S. 383 (1914). In that case the Court declared, at 391-92:

> The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against *all* unreasonable searches and seizures under the guise of law. This protection reaches *all alike, whether accused of crime or not*, and the duty of giving to it force and effect is obligatory upon our Federal system with the enforcement of the laws. (emphasis added.)

In *See v. Seattle*, 387 U.S. 541 (1967); and *Camara v. Municipal Court*, 387 U.S. 523 (1967), this Court put to rest any lingering doubts that the fourth amendment was applicable to civil matters by reversing contempt charges against defendants who had failed to admit building inspectors. In *Camara* this Court, at 387 U.S. 530, said:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.

Perhaps an even more definitive statement was delivered by Judge Prettyman in *District of Columbia v. Little*, 178 F.2d 13, 16-17 (D.C. Cir. 1949), in response to the argument that the fourth amendment is premised upon and limited by the fifth amendment:

> The basic premise of the prohibition against searches was not protection against self-incrimination; it was the common-law right of a man to privacy in his home, a right which is one of the indispensable ultimate essentials of our concept of civilization. It was firmly established in the common law as one of the bright features of the Anglo-Saxon contributions to human progress. It was not related to crime or to suspicion of crime. It belonged to all men,

> not merely to criminals, real or suspected. So much is clear from any examination of history, whether slight or exhaustive. The argument made to us has not the slightest basis in history. It has no greater justification in reason. To say that a man suspected of crime has a right to protection against search of his home without a warrant, but that a man not suspected of crime has no such protection, is a fantastic absurdity.

See also Abel v. United States, 362 U.S. 217, 254 (Brennan, J., dissenting).

The protections of the fourth amendment and its attendant exclusionary rule have been extended to various types of civil proceedings by this Court and other federal courts. These types of cases include forfeiture proceedings,[10] civil anti-trust actions,[11] civil tax actions,[12] and a suit by a civilian Government employee seeking back pay.[13]

This Court has, furthermore, clearly reiterated that the fourth amendment applies to civil matters in several recent decisions. In *Wyman v. James*, ___ U.S. ___, 27 L.E.2d 408, 413 (1971), the Court stated that "one's Fourth Amendment protection subsists apart from his being suspected of criminal behavior." The Court there refused to hold home visits to welfare recipients violative of the

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[10] *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1958).

[11] *Iowa v. Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 404-11 (S.D. Iowa 1966).

[12] *Pizzarello v. United States*, 408 F.2d 579 (2d Cir. 1969), *cert. denied*, 396 U.S. 986 (1969); and *Rogers v. United States*, 97 F.2d 691 (1st Cir. 1938).

[13] *Saylor v. United States*, 374 F.2d 894 (U.S. Ct. Cl. 1967).

State v. Lowry, 95 N.J. Super. 307, 230 A.2d 907, 910 (1967), has extended fourth amendment protections to juveniles and two other state cases have extended that amendment's scope to cases involving private parties only and not governmental entities. *Lebel v. Swincicki*, 354 Mich. 427, 93 N.W.2d 281 (1958); and *Williams v. Williams*, 8 Ohio Misc. 156, 221 N.E.2d 662 (Clermont County C.P. 1966).

fourth amendment because neither a search nor unreasonable state action was involved. Here, of course, there is not only a search but a seizure as well. Moreover, the action of state officials here hardly serves the rehabilitative function which the Court held home visits served to welfare recipients.

Also pertinent are the Court's decisions in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics,* ___ U.S. ___, 91 S.Ct. 1999 (1971); and *Griswold v. Connecticut,* 381 U.S. 479, 484-85 (1965). In *Bivens* the Court held that the fourth amendment could properly serve to establish a cause of action in a purely civil action for damages. In *Griswold* the Court, describing the fourth and fifth amendments as a "protection against all government invasion 'of the sanctity of a man's home and the privacies of life,'" utilized this amendment as one of the grounds for striking down a Connecticut statute prohibiting the use of contraceptives because said statute invaded the privacy of married persons.

Finally, in *Laprease v. Raymours Furniture Co.,* 315 F. Supp. 716 (N.D. N.Y. 1970); and *Blair v. Pitchess,* ___ Cal. 3d ___, ___ P.2d ___, ___ Cal. Rptr. ___ (Sup. Ct. No. 942-966, opinion filed July 1, 1971), state procedures closely analogous to the Pennsylvania statutes challenged here were stricken down on fourth amendment grounds. The *Laprease* court, meeting an argument much like that of the court below in this case held, at 722:

> The argument that the Fourth Amendment does not apply, is supported by neither good sense nor law. If the Sheriff cannot invade the privacy of a home without a warrant when the state interest is to prevent crime, he should not be able to do so to retrieve a stove or refrigerator about which the right to possession is disputed.

The *Blair* court, considering *See, Camara,* and *Wyman,* concludes that "[t]he teaching of these cases in that the Fourth Amendment applies to civil as well as criminal matters." ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 18). Finding that "the citizen's

right to privacy is infringed almost as much by such civil intrusions as by searchers in the traditional context," the court holds the California statutes violative of the fourth amendment. ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 19).

The Court's analysis that the fourth amendment's chief thrust is the preservation of the privacy of all individuals, whether charged with a crime or not, makes it clear that the fourth amendment protects the right of the poor consumer to be free from unreasonable invasions of his home and seizures of his property by government officials executing civil process. It is submitted, therefore, that the court below erred when it declared that "we are not convinced of the applicability of the Fourth Amendment to the proceedings here in issue, . . ." App. at 105. It does apply. The only real issue is whether the court below also erred in declaring that the seizured involved were not unreasonable.

B. Since the Defendant Sheriff Is Required To Forcibly Enter the Home of the Replevin Writ Defendant and Seize the Property on the Writ Irrespective of the Fact that the Merits of the Writ Plaintiff's Claim Have Not Been Adjudicated, Examined, or Even Alleged by the Writ Plaintiff, the Pennsylvania Procedure Authorizes an Illegal Search and Seizure.

In several passages in its opinion, the court below placed great emphasis on the fact that the Pennsylvania replevin rules make no express statement that the sheriff is required to forcibly execute upon a writ of replevin if he is unable to gain peaceable entry to the writ defendant's home. App. at 90, 103, 104. In so doing, the court not only ignored a plethora of Pennsylvania case law, but also ignored its own finding that

> [t]he Sheriff, or his agents, when executing upon a writ of replevin with bond, is *required* to enter

> the home of the defendant on the writ and to seize with or without consent of the defendant any and all property named in the writ. App. at 90. (emphasis added.)

The principal Pennsylvania case is *Jones v. Herron*, 1 Dist. 475, 12 Pa. C.C. 183 (Phildelphia County C.P. 1892). That case holds, at 1 Dist. 476, 12 Pa. C.C. 184, that

> in a writ of replevin the command is to take the goods of a plaintiff who has entered security for their return . . . and, under common law and statute, the sheriff may break outer doors or enter by unusual ways for the purpose of executing on the writ.

The *Jones* holding is quoted in two criminal cases in which the defendants were convicted of obstruction of legal process for resisting sheriffs executing replevin writs. *Commonwealth v. Temple*, 38 D. & C. 2d 120 (Centre County Q.S. 1965); and *Commonwealth v. Valvano*, 33 D. & C. 128 (Lackawanna County Q.S. 1936). Also pertinent is a civil action brought by a writ defendant for illegal entry against a writ plaintiff, the latter of whose agent, at the direction of deputy sheriffs, entered through the writ defendant's window; the court directed a compulsary non-suit on the ground that the entry was lawful. *Deford v. May, Stern & Co.*, 42 York Leg. Rec. 13 (Allegheny County C.P. 1927).

It is conceded that there was neither violence nor breaking and entering by the sheriff's deputies in the executions upon any of the three named plaintiffs. However, there is no evidence on the record which supports the court's finding that "[i]n none of the individual cases did the Sheriff *forcibly* break and enter into the premises of plaintiffs." App. at 91. (emphasis added).

Force may be effected by psychological as well as physical means. The writ defendant who submits to the seizure of his property by the country sheriff under the force of authority cannot be said to have voluntarily forfeited his property. *See Bumper v. North Carolina*, 391 U.S. 543,

548-50 (1968); and *Johnson v. United States*, 333 U.S. 10, 13 (1948). It would have been foolhardy as well as fruitless for Mrs. Parham, who did at first attempt to deny the sheriff's deputies entry, to have persisted in her refusal and subject herself to criminal liability. This conclusion is supported by the *Blair* decision, which declares that "[i]n such a situation acquiescence to the intrusion cannot operate as a voluntary waiver of Fourth Amendment rights." ___ Cal. 3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 23).

Moreover, under the reasoning of *Wuchter v. Pizzutti*, 276 U.S. 24 (1928); and *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915), discussed at pp. 41-42 *surpa*, the court erred in focusing upon the individual fact situations before it rather than considering the state statutory scheme on its face. *Cf. Blair.*

The fact that forcible entries and seizures can and do occur in executions upon replevin writs is established by the affidavit of Margaret Elzeena Johnson of Chester, Pennsylvania, which is attached hereto as Appendix "C". In her case, sheriff's deputies executing upon a writ of replevin broke into her home while she was at work by breaking her door glass and pulling the door casing and frame off the wall. Having effected permanent damage to the door and leaving Mrs. Johnson's home completely accessible to any and all passers-by, the deputies seized and removed the goods cited on the replevin writ.

The court below terms the seizures here reasonable because they were "purely civil in nature, seeking property covered by lawfully created security interests." App. at 105. It is clear, however, that the Washington seizure did not concern property covered by a security interest and that the security involved in the Epps seizure was invalid. *See Williams v. Walker-Thomas Furniture, Inc.*, 350 F.2d 445 (D.C. Cir. 1965). Of most significance, however, is that the Pennsylvania replevin procedure provides no means to screen out unfounded or wrongful claims. There is no requirement

that the writ plaintiff prove, present ex parte, or even allege a claim of right.

At no point need the writ plaintiff, then, establish probable cause for his claim, which *Camara* terms a prerequisite. In criminal cases, a search warrant must be obtained from a magistrate before a lawful search and seizure may result. Here, the writ plaintiff need present his case before no court officer. *See* Note, 19 U. Kan. L. Rev. 281, 286-87 (1971). He merely presents his entry of appearance, affidavit of value, bond and praecipe to the writ of the sheriff, who in turn ministerially issues the writ. In the California procedure challenged in *Blair*, the writ plaintiff was at least required to file a complaint, obtain the issuance of a summons, and file an affidavit asserting a claim of right and wrongful detention. ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 2). Nevertheless, the court there found that these procedures "do not satisfy the probable cause standard." ___ Cal.3d at ___, ___ P.2d at ___, ___ Cal. Rptr. at ___ (slip opinion at 20).

The plaintiffs contend, in their due process argument, that notice and an opportunity to be heard must precede a forcible seizure of their property. Here, however, they emphasize that the absence of *any* judicial inquiry into the merits of the plaintiff's claim prior to a forcible search of their home and seizure of their personal property renders the replevin procedure violative of the fourth amendment.

CONCLUSION

For all of the reasons stated herein, it is respectfully submitted that the judgment of the court below should be reversed.

/s/ David A. Scholl
DAVID A. SCHOLL

/s/ Harold I. Goodman
HAROLD I. GOODMAN

/s/ Jonathan M. Stein
JONATHAN M. STEIN

/s/ Harvey N. Schmidt
HARVEY N. SCHMIDT

August 7, 1971

APPENDIX "A"

STATUTES AND RULES INVOLVED

The Act of 1705, 1 Sm.L. 44, §12, 12 P.S. §1821, provides as follows:

> **§1821. Writs of replevin authorized**
>
> It shall and may be lawful for the justices of each county in this province to grant writs of replevin, in all cases whatsoever, where replevins may be granted by the laws of England, taking security as the said law directs, and make them returnable to the respective courts of common pleas, in the proper county, there to be determined according to law.

The Act of April 19, 1901, P.L. 88, as amended, 12 P.S. §§1824 to 1844, provides as follows:

> **§1824. Issue of writ; bond**
>
> Before any writ of replevin shall issue out of any court of this commonwealth, the person applying for said writ shall execute and file with the prothonotary of the said court a bond to the commonwealth of Pennsylvania, for the use of the parties interested, with security in double the value of the goods sought to be replevied, conditioned that if the plaintiff or plaintiffs fail to maintain their title to such goods or chattels, he or they shall pay to the party thereunto entitled the value of said goods and chattels, and all legal costs, fees and damages which the defendant or other persons, to whom such goods or chattels so replevied belong, may sustain by reason of the issuance of such writ of replevin.
>
> **§1825. Service of writ; certification of name of person in possession; intervention as defendant**
>
> If any other person than the defendant named in the writ be found in possession of the goods and chattels he shall be duly served with a writ, and his name added as a party defendant to the cause. The writ shall command the sheriff to serve the party in

possession as well as the defendant named. The sheriff shall, on demand of such person, forthwith certify his name and address to said prothonotary as that of the party in possession; and then, if such person files an affidavit in said court that said goods and chattels belong to him, he may file a counter bond in proper time and manner, or otherwise act as a defendant before the return of said writ, without obtaining leave to intervene.

§1826. Intervention and counter bond

The court or, in vacation time, a judge thereof at chambers, may grant leave to any person, upon an affidavit filed that the goods and chattels so replevied belong to him, to intervene as party defendant in such suit; and the defendant or party so intervening may file a counter bond within seventy-two hours after such goods or chattels have been replevied, during which time said goods and chattels shall remain in the possession of the sheriff, and which time may be extended by the court or, in vacation time, a judge thereof at chambers, upon cause shown. Such counter bond shall be given to the Commonwealth of Pennsylvania, for the use of the parties interested, in the same amount as the original bond and with like conditions.

§1827. Right of possession in case of several claimants

Where several parties claim the right to give a counter bond and have possession of said goods and chattels, the party who is in actual or constructive possession of the goods and chattels at the time the writ of replevin was served shall, upon entering the proper counter bond, be entitled to have said goods and chattels.

§1828. Claim property bond

Provided, that in any action of replevin hereafter to be brought, where the defendant or person intervening in such action, claiming title to the property

replevied, shall enter a claim property bond therefor, if the plaintiff at the time he files his bond, and before the writ is issued, did aver that by reason of the nature of such property, or of any special circumstances connected with his alleged ownership thereof, the actual pecuniary value of such property will not compensate him for the loss thereof, the court or, in vacation time, any judge thereof at chambers, shall order such property to be impounded in the custody of the sheriff, or such other person as the court or, in vacation time, any judge thereof at chambers, may designate, to abide the final determination of the action.

§1829. Estimate of charges to be exhibited

Provided the plaintiff shall exhibit an estimate of the probable necessary charges and expenses of the storage, care or keep of such property pending the final determination of such action, and shall pay, or secure the payment of, such charges and expenses as the court or, in vacation time, any judge thereof at chambers, shall approve.

§1830. Security

The amount of such security shall be fixed by the court, or, in vacation time, by any judge thereof at chambers, and said security shall be approved in the same manner as now provided for the approval of the security entered by the plaintiff on the issuing of the writ of replevin. The bond shall be to the Commonwealth, and shall be for the use of any party interested in the payment of the storage, care or keep of the impounded property.

§1831. Delivery of property; costs

Upon the final determination of such action, the property so impounded shall be delivered to the party who shall have successfully maintained his title thereto, and the charges and expenses of the storage, care or keep of such property shall be assessed as costs of suit, and shall be recoverable from the

unsuccessful party in the same manner as damages and costs are now recoverable in action of replevin.

§1832. Declaration

The plaintiff in such action shall file a declaration, verified by oath, which shall consist of a concise statement of his demand, setting forth the facts upon which his title to the goods and chattels is based.

§1833. Rule to file declaration

The defendant or party intervening may enter a rule upon plaintiff to file such declaration within fifteen days, and the plaintiff failing so to do a judgment of non pros. shall be entered, which judgment shall operate to forfeit said bond.

§1834. Affidavit of defense; judgment by default

The defendant or party intervening shall, within fifteen days after the filing of such declaration, file an affidavit of defense thereto, setting up the facts denying plaintiff's title and showing his own title to said goods and chattels; and in event of his failure so to do, upon proof that a copy of said declaration was served upon him or his attorney, judgment may be entered for the plaintiff and operates to forfeit any counter bond given by him.

§1835. Judgment in case of insufficient affidavit of defense

The court may enter judgment, with like effect, for want of a sufficient affidavit of defense, or for such goods and chattels as may be admitted to be the property of the plaintiff in the affidavit of defense, or may enter judgment, with like effect, for such goods and chattels as to which the court may adjudge the affidavit of defense insufficient.

§1836. Recovery of goods

And in the event of judgment being rendered in favor of the plaintiff for a portion of such goods

and chattels replevied, he may proceed to recover such goods and chattels by writ of retorno habendo, or the value thereof after assessment of damages on a writ of inquiry of damages issued, and the case shall be proceeded in for recovery of the balance.

§1837. Proceedings in case defendant does not appear

If the defendant has been duly summoned and does not appear at the return-day of the writ, the plaintiff, having filed his declaration, may file a common appearance for the defendant, and proceed in the cause as in other cases.

§1838. Judgment for default of appearance

Where the writ has been returned nihil habet as to the defendant, it shall be lawful for the plaintiff, at and after forty-five days after the execution of the writ, to take judgment against the defendant for default of appearance: Provided, that the plaintiff, fifteen days prior to the entry of said judgment, shall have filed his declaration.

§1839. Issues

The declaration and affidavit of defense as originally filed, or as amended by leave of court, shall constitute the issues under which, without other pleadings, the question of the title to, or right of possession of, the goods and chattels as between all the parties shall be determined by a jury.

§1840. Conditional verdict

If any party be found to have only a lien upon said goods and chattels, a conditional verdict may be entered, which the court shall enforce in accordance with equitable principles.

§1841. Proceedings when verdict is for party not in possession

If the title to said goods and chattels be found finally to be in a party who has not been given

possession of the same, in said proceeding, the jury shall determine the value thereof to the successful party, and he may, at his option, issue a writ in the nature of a writ of retorno habendo, requiring the delivery thereof to him, with an added clause of fieri facias as to the damages awarded and costs; and upon failure so to recover them, or in the first instance, he may issue execution for the value thereof and the damages awarded and costs; or he may sue, in the first instance, upon the bond given, and recover thereon the value of the goods and chattels, damages and costs; in the same manner that recovery is had upon other official bonds.

§1842. Bail

The prothonotary shall, in the first instance, fix the amount of bail and approve or reject the security offered. His action in either regard shall be subject to revision by the court or, in vacation time, a judge thereof at chambers. In order to determine the amount of bail, the plaintiff shall make an affidavit of the value of the goods and chattels, which value shall be the cost to the defendant of replacing them, should the issue be decided in his favor. The court or, in vacation time, a judge thereof at chambers may, upon motion, increase the amount of bail required; may require new bail, if for any reason the old bail has become insufficient, and may enter a non pros. against the party in default, if he has the goods and chattels, and its orders be not complied with, or may permit the substitution of bail for that already given and enter an exoneratur on the bail bond.

§1843. Alias and pluries writs

Alias and pluries writs of replevin may be issued if the goods and chattels be not taken or all the defendants named be not served, and the cause may proceed against defendants in fact served, though the goods and chattels be not found.

§1844. Limitation of action on bond

No action shall be brought upon any bond given in accordance with the provisions of this act unless commenced within a year and a day after the final determination of the suit in which the bond was given. At the expiration of such period, if no action has been brought thereon, the said bond shall be discharged.

The Pennsylvania Rules of Civil Procedure challenged herein provide as follows:

Rule 1406. Action of Replevin

The rules governing the action of replevin shall not be deemed to suspend or affect

(1) Section 3 of the Act approved April 3, 1779, 1 Sm. L. 470, Chap. DCCCXXVI, 12 P.S. 1846.

(2) Section 7 of the Act approved March 22, 1817, P.L. [1816-17] 122, Chap. XCVIII, 6 Sm. L. 432, Chap. 4870, 53 P.S. 7177.

(3) Section 1 of the Act approved May 15, 1871, P.L. 268, No. 249, 12 P.S. 1847.

(4) Section 1 of the Act approved April 20, 1876, P.L. 43, No. 30, 12 P.S. 2174.

(5) Section 1 of the Act approved June 8, 1881, P.L. 86, No. 95, 6 P.S. 3.

(6) Section 10 of the Act approved April 19, 1901, P.L. 88, No. 61, as last amended by the Act approved April 30, 1925, P.L. 387, No. 233, Sec. 1, 12 P.S. 1844.

(7) Section 1 of the Act approved May 7, 1925, P.L. 557, No. 300, 6 P.S. 11.

(8) Section 21 of the Act approved February 19, 1926, P.L. 16, No. 3, as last amended by the Act approved June 16, 1937, P.L. 1811, No. 371, 47 P.S. 141.

(9) Section 7 of the Act approved June 10, 1931, P.L. 492, No. 156, 3 P.S. 635.

Rule 1071. Conformity to Assumpsit

Except as otherwise provided in this chapter, the procedure in the action of replevin from the commencement to the entry of judgment shall be in accordance with the rules relating to the action of assumpsit.

Rule 1072. Venue

(a) The action without bond may be brought in a county in which an action of assumpsit may be brought.

(b) The action with bond may be brought in a county in which an action of assumpsit may be brought or in the county in which the property to be replevied is found.

Rule 1073. Commencement of Action

(a) An action of replevin with bond shall be commenced by filing with the prothonotary a praecipe for a writ of replevin with bond, together with

(1) the plaintiff's affidavit of the value of the property to be replevied, and

(2) the plaintiff's bond in double the value of the property, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the plaintiff fails to maintain his right of possession of the property, he shall pay the party entitled thereto the value of the property and all legal costs, fees and damages sustained by reason of the issuance of the writ.

(b) An action of replevin without bond shall be commenced by filing with the prothonotary

(1) a praecipe for a writ of replevin without bond or

(2) a complaint.

If the action is commenced without bond, the sheriff shall not replevy the property but at any time before the entry of judgment the plaintiff, upon filing the affidavit and bond prescribed by subdivision (a) of

this rule, may obtain a writ of replevin with bond, issued in the original action, and have the sheriff replevy the property.

Rule 1074. Service

(a) The sheriff shall serve the writ of replevin without bond in the same manner as a writ of summons in assumpsit.

(b) The sheriff shall serve the writ of replevin with bond upon the defendant and any person not named as a party who is found in possession of the property in the same manner as a writ of summons in assumpsit and shall take possession of the property.

(c) When the sheriff takes possession of the property the plaintiff shall have the right of service upon a defendant in any other county by having the sheriff of the county in which the action was commenced deputize the sheriff of the other county where service may be had.

(d) When a person in possession of the property who is not a party to the action is served with a writ of replevin with bond the sheriff shall so state in his return and said person shall thereupon become a defendant in the action.

(e) When a writ of replevin with bond is issued but the property cannot be found, the action shall continue against any defendant served as an action of replevin without bond.

Rule 1075. Reissuance of Writ of Replevin With Bond

When a writ of replevin with bond is reissued, no new affidavit or bond need be filed.

Rule 1076. Counterbond

A counterbond may be filed with the prothonotary by a defendant or intervenor claiming the right to the possession of the property, except a party claiming only a lien thereon, within seventy-two (72)

hours after the property has been replevied, or within seventy-two (72) hours after service upon the defendant when the taking of possession of the property by the sheriff has been waived by the plaintiff as provided by Rule 1077(a), or within such extension of time as may be granted by the court upon cause shown.

(b) The counterbond shall be in the same amount as the original bond, with security approved by the prothonotary, naming the Commonwealth of Pennsylvania as obligee, conditioned that if the party filing it fails to maintian his right to possession of the property he shall pay to the party entitled thereto the value of the property, and all legal costs, fees and damages sustained by reason of the delivery of the replevied property of the party filing the counterbond.

Rule 1077. Disposition of Replevied Property. Sheriff's Return

(a) When a writ of replevin with bond is issued, the sheriff shall leave the property during the time allowed for the filing of a counterbond in the possession of the defendant or of any other person if the plaintiff so authorizes him in writing.

(b) Property taken into possession by the sheriff shall be held by him until the expiration of the time for filing a counterbond. If the property is not ordered to be impounded and if no counterbond is filed, the sheriff shall deliver the property to the plaintiff.

(c) If the property is not ordered to be impounded and the person in possession files a counterbond, the property shall be delivered to him, but if he does not file a counterbond, the property shall be delivered to the party first filing a counterbond.

(d) When perishable property is replevied the court may make such order relating to its sale or disposition as shall be proper.

(e) The return of the sheriff to the writ of replevin with bond shall state the disposition made by him of the property and the name and address of any person found in possession of the property.

Rule 1078. Exemption of Property Preliminary Objection

The objection of immunity or exemption of property from replevin shall be raised by preliminary objection.

Rule 1079. Impounding Property

(a) Prior to the delivery of the property by the sheriff to any party, a petition may be filed by any party requesting the court to order the property to be impounded in the custody of the sheriff or such other person as the court may direct.

(b) The court shall order the property to be impounded if

(1) the circumstances are such that the petitioner if found entitled to the property would not be adequately compensated for its loss by the payment of its pecuniary value, and

(2) the petitioner furnishes security for the payment of storage charges and other expenses incidental to impounding of the property.

(c) Upon the final determination of the action, the property shall be delivered to the successful party and the storage charges and other expenses incidental thereto shall be assessed as costs in the action. Adopted June 25, 1946. Eff. Jan. 1, 1947.

Rule 1080. Objections to Bond

The court, upon petition filed by any party, and after notice and hearing, may

(1) review the action of the prothonotary in approving or rejecting the security offered;

(2) increase or decrease the amount of any bond or require additional security for cause shown;

(3) strike off a bond improperly filed; or

(4) permit the substitution of a bond and enter an exoneration of a prior bond.

Rule 1081. Concealment of Property Examination of Defendant

The court, at any time during the pendency of the action, upon the petition of the plaintiff setting forth

(1) that he is without knowledge of the location of the property and has not with reasonable diligence been able to ascertain its location; or

(2) that the sheriff has been unable to locate the property; or

(3) that the defendant has concealed, removed or transferred the property,

may order the defendant to appear and be examined orally under oath as to the whereabouts of the property. The court may enforce its order by attachment. If a writ of replevin with bond has been issued, the court may order the defendant to deliver the property to the sheriff if it is within the county or has been removed from the county for the purpose of preventing its recovery.

Rule 1082. Counterclaim. Lien. Conditional Verdict

(a) A claim secured by a lien on the property may be set forth as a counterclaim. No other counterclaim may be asserted.

(b) If any party is found to have a lien upon the property the court may enter a conditional verdict in order to enforce the rights of all parties.

Rule 1083. Judgment for Property When Defendant Is Not Served and Does Not Appear

If the property has been replevied by the sheriff, the court, upon motion of the plaintiff after complaint filed and after forty-five (45) days from

replevy of the property, may enter judgment against any defendant who has not been served and who has not appeared in the action.

Rule 1084. Judgment Before Trial When Defendant Is Served or Appears

(a) If judgment is entered before trial for the party in possession of the property, the judgment shall determine.

(1) his right to retain possession of the property, and

(2) his right to recover special damages, if any.

(b) If judgment is entered before trial for a party not in possession of the property, the judgment shall determine

(1) his right to recover possession of the property

(2) the money value of the property based upon the value set forth in the plaintiff's complaint, and

(3) his right to recover special damages, if any.

(c) Special damages shall be assessed by a trial at which the issues shall be limited to the amount of the damages.

Rule 1085. Judgment After Trial.

(a) If judgment is entered after trial for the party in possession of the property, the judgment shall determine

(1) his right to retain possession of the property, and

(2) the amount of any special damages sustained.

(b) If judgment is entered after trial for a party not in possession of the property, the judgment shall determine

(1) his right to recover possession of the property

(2) the money value of the property, and

(3) the amount of any special damages sustained.

Rule 1086. Judgment. Enforcement

Judgment shall be enforced as provided in Rules 3170 to 3173, inclusive.

Rule 1087. Trial Without Jury.

The trial of actions in replevin by a judge sitting without a jury shall be in accordance with Assumpsit Rule 1038.

RC TP 0001825397

DATE	TP BALANCE	RC BALANCE	TP PURCH.	RC PURCH.	ACCOUNT STATUS TP PMT.	RC PMT.	TOTAL PMT.	RC STATUS+	TP STATUS+
7- 7-68	467.23	–	373.34 2 Wed. Rngs 1 Watch & Band 28 @ 16.50	–	0	0	0	current	current
8- 7-68	467.23	–	–	–	0	0	0		due 16.50
9- 7-68	467.23	–	–	–	0	0	0		due 33.00
10- 7-68	434.23	437.40	–	104.40 37 mo.	33.00	30.00	63.00	due 37.00	due 16.50
11- 7-68	1,125.34	440.61	509.76 1 GE stereo 1 @ 16.50 34 @ 32.00	33.34	16.50	37.00	53.50	due 37.00	due 16.50
12- 7-68	1,108.84	515.13	–	104.61 43 mo.	16.50	37.00	53.50	due 43.00	due 32.00
1- 7-69	1,359.36	893.65	125.00 1 antenna & Install. 36 @ 38.00	413.43 74 mo.	32.00	43.00	75.00	due 74.00	due 38.00
2- 7-69	1,359.36	909.36	–	1.68	0	0	0	due 148.00	due 76.00
3- 7-69	1,321.36	715.03	–	13.39	38.00	222.00	260.00	current	due 76.00
4- 7-69	1,245,36	1,028.26	–	376.25 75 mo.	76.00	74.00	150.00	current	due 38.00
5- 7-69	1,245.36	1,068.70	–	24.30	0	0	0	due 16.42	due 76.00
6- 7-69	1,207.36	1,017.55	–	8.72	38.00	74.00	112.00	due 17.42	due 76.00
7- 7-69	1,131.36	1,004.02	–	7.50	76.00	37.00	113.00	due 55.42	due 38.00
8- 7-69	1,093.36	1,026.40	–	81.42	38.00	75.00	113.00	due 55.42	due 38.00
9-11-69	1,055.36	1,037.96	–	80.65 85 mo.	38.00	85.00	123.00	due 55.42	due 38.00

RE: MITCHELL R. EPPS RC TP 0001825397 ACCOUNT STATUS CONTINUED

Date	TP Balance	RC Balance	TP Purch.	RC Purch.	TP PMT.	RC PMT.	Total PMT.	RC Status	TP Status
10-11-69	1,055.36	1,077.22	-	22.97	0	0	0	due 140.42	due 74.00
11-11-69	981.36	1,022.61	-	68.90	74.00	140.42	214.42	due 85.00	due 38.00
12-11-69	981.36	1,061.30	-	122.64 90 mo.	0	100.00	100.00	due 75.00	due 76.00
1-11-70	905.36	1,305.65	-	317.69 100 mo.	76.00	90.00	166.00	due 85.00	due 38.00
2-11-70	905.36	1,365.19	-	54.74	0	0	0	due 185.00	due 76.00
3-11-70	829.36	1,300.93	-	99.30	76.00	185.00	261.00	due 100.00	due 38.00
4-11-70	1,278.44	1,452.48	259.22 1 5x15 carp 35@35.75	131.14 122 mo.	0	0	0	due 222.00	due 73.75
5-11-70	1,228.44	1,432.09	-	115.52	50.00	150.00	200.00	due 194.00	due 59.50
6-11-70	1,192.69	1,354.57	-	-	35.75	100.00	135.75	due 216.00	due 59.50
7-10-70	1,169.84	1,375.83	-	-	24.00	0	24.00	due 340.00	due 71.75
8- 9-70	1,098.59	1,368.67	-	-	71.25	28.75	100.00	due 433.25	due 35.75

APPENDIX C

MITCHELL EPPS, et al., *Appellants*	:	
v.	:	*October Term, 1971*
AMERICO V. CORTESE, et al., *Appellees*	:	No. 70-5138
COMMONWEALTH OF PENNSYLVANIA	:	
COUNTY OF DELAWARE	:	ss

AFFIDAVIT

MARGARET ELZEENA JOHNSON, being duly sworn according to law deposes and says:

1. That she is Margaret Elzeena Johnson; that she resides at 1018 Concord Street, Chester, Pennsylvania; and that she is living with her child separate and apart from her husband.

2. That she and her husband at a time in the past entered into a credit transaction, which has since resulted in General Electric Credit Corporation, Public Ledger Building, Sixth and Walnut Street, Philadelphia, Pennsylvania, representing the creditor-vendor in such credit transaction.

3. That previous to April 29, 1972, her last contact with General Electric Credit Corporation had been on or about the first week in March, 1971 when she paid ten dollars ($10.00) on her and her husband's account with the understanding that a reduced payment schedule would be forwarded to her.

4. That upon returning home from her work at Kenneth Janatorial Service, Folsom, Pennsylvania on April 19, 1971 she discovered that someone or group had made a forcible entry of her home and had taken a substantial portion of her furniture. The forcible entry caused the door used for entry to be substantially damaged, the glass in the door to

be broken and the door casing and frame to be pulled loose from the wall to which it is a part of and attached.

5. That upon further investigation she discovered that such forcible entry and taking of her furniture had been accomplished by the Sheriff of Delaware County or his agents pursuant to an Action of Replevin With Bond instituted by General Electric Credit Corporation, Court of Common Pleas Docket No. 3659, 1971.

6. That her first notice of General Electric Credit Corporation's instituting an Action of Replevin With Bond and that her first contact of any kind with General Electric Credit Corporation since the first week in March, 1971 was after she returned to her residence from work on April 19, 1971.

/s/ Margaret Johnson
Margaret Elzeena Johnson

Sworn to and subscribed
before me this *6th* day of
May, 1971.

/s/ Thomas M. Graham
Thomas M. Graham
Notary Public, Media, Delaware County
My Commission Expires September 3, 1973